

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIZE MARSH,

Defendant-Appellant.

UNPUBLISHED

June 11, 2013

No. 310046

Wayne Circuit Court

LC No. 11-011303-FH

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), receiving or concealing a stolen firearm, MCL 750.535b(2), larceny of a firearm, MCL 750.357b, larceny in a building, MCL 750.360, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant concurrently to 3 to 20 years' imprisonment for the home invasion conviction, 2 to 10 years' imprisonment for the receiving or concealing a stolen firearm conviction, two to five years' imprisonment for the larceny of a firearm conviction, and two to four years' imprisonment for the larceny in a building conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from a home-invasion that occurred at the home of Idus Tyson and his son Jezreel Rumbley. The offense occurred between midnight and 2:30 a.m. on August 16, 2011, while Tyson and Rumbley were away from the home. There were no witnesses to the incident, to which defendant was connected by his fingerprints found on the broken and partially open window in Rumbley's bedroom, and his possession of a handgun that allegedly was stolen during the offense.

Defendant's sole argument on appeal is that the trial court improperly proceeded with the prosecution's case-in-chief in defendant's absence, thereby violating defendant's right to be present during trial. This issue has not been preserved for appeal because there was no objection at trial to proceeding in defendant's absence. *People v Buie (On Remand)*, 298 Mich App 50, 56; 825 NW2d 361 (2012). Accordingly, defendant is not entitled to appellate relief unless he can show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a due process right to be present during the proceedings “whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge[.]” *United States v Gagnon*, 470 US 522, 526; 105 S Ct 1482; 84 L Ed 2d 486 (1985) (quotation marks and citation omitted). This right is also statutorily protected by MCL 768.3, which provides in part that “[n]o person indicted for a felony shall be tried unless personally present during the trial[.]” “A defendant has a right to be present during . . . any . . . stage of trial where the defendant’s substantial rights might be adversely affected.” *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). “[A] defendant may waive his right to be present by affirmative consent or by failing to appear when he is at liberty to do so.” *Id.* at 248. A waiver consists of the intentional relinquishment of a known right, *Buie (On Remand)*, 298 Mich App at 57, and only the defendant can waive his due process right to be present at his trial, *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). A waiver by conduct can be found where the defendant voluntarily and deliberately absents himself from the trial without good cause. *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975); *People v Gross*, 118 Mich App 161, 164-166; 324 NW2d 557 (1982). But if the record is silent regarding the reason for the defendant’s absence or whether he knew of his right to attend, there is no waiver because a waiver will not be presumed from a silent record. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995); *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988). But if the defendant’s absence is in fact voluntary, the waiver is deemed to be knowing. See *Taylor v United States*, 414 US 17, 20; 94 S Ct 194; 38 L Ed 2d 174 (1973) and *United States v Tortora*, 464 F2d 1202, 1208 (CA 2, 1972).

The record shows that defendant was present for jury selection on February 29, 2012. After a jury was selected, the case was adjourned until 8:30 a.m. the next day. Defendant did not appear the next morning. When he had not appeared by 10:00 a.m., the court proceeded without him. The only explanation offered by counsel for defendant’s absence was that he was “sort of nervous,” which would suggest that he had deliberately absented himself from the proceedings. Additionally, there is no dispute that defendant attended the first day of trial and was informed that trial would continue the next morning. Although defendant did not appear the next day, he did appear the following morning and clearly knew of his right to attend. We conclude that defendant’s absence was voluntary and therefore was a “knowing” waiver. *Taylor*, 414 US at 20.

Nevertheless, to the extent that the lack of a clear explanation for defendant’s absence can be considered plain error, defendant is not entitled to appellate relief because the record does not show that defendant was prejudiced. “[T]he test for whether defendant’s absence from a part of his trial requires reversal of his conviction is whether there was any reasonable possibility that defendant was prejudiced by his absence.” *Buie (On Remand)*, 298 Mich App at 59 (quotation marks and citation omitted). In *Buie*, this Court observed that “it is no longer the law that injury is conclusively presumed from [the] defendant’s every absence during the course of a trial.” *Id.*, quoting *People v Morgan*, 400 Mich 527, 535; 255 NW2d 603 (1977).

Due to his absence, defendant missed the prosecution’s case-in-chief. The prosecutor’s proofs showed that defendant knew that handguns were kept in Tyson’s bedroom, that Tyson’s house was the site of a break-in that resulted in the loss of many items, including Tyson’s handguns, that defendant was found in possession of one of the stolen handguns less than 48 hours after the offense, and that defendant’s fingerprints were found on the window through

which the perpetrator(s) had apparently gained entry. Despite his absence on the second day of trial, defendant was able to respond to the prosecutor's proofs by presenting evidence that Rumbley had shown him the handguns and sold one to him approximately a week before the home invasion. Defendant testified that he purchased the gun from Rumbley and that a friend witnessed the transaction. Defendant offered not wholly implausible explanations for why his fingerprints were on Rumbley's window and why he initially told police that he had found the gun in an alley. While defendant claims that his absence prevented him from assisting defense counsel with his cross-examination of Rumbley, he does not explain what questions counsel might have asked Rumbley that could have so seriously undermined his credibility as to affect the outcome of the trial. Therefore, defendant has not demonstrated prejudice arising from his partial absence from trial.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra